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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-581

SS SANTA ROSA, her engines, boilers, machinery, tackle, apparel and appurtenances, etc.
and
HAMBURG - SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELL-SCHAFT EGGERT & AMSINCK,

Petitioners,

v.

EDITH LOOMIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,
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FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals err in holding that Paragraph 13 of the carrier's passenger ticket form providing a limitation period of one year for institution of suits against the carrier (Columbus Line, Inc.) did not preclude an action *in rem* against vessel SANTA ROSA by a passenger to recover damages for personal injury, instituted approximately twenty months after the injury?

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners' Statement of the case is correct, as far as it goes.

The opinion of the Court of Appeals for the Ninth Circuit appears at 447 F.2d 105 (1971).

Attached hereto as Appendix 1 is a true copy of the ticket which petitioner urges as precluding actions *in rem* against the SANTA ROSA unless instituted within one year. (Trial Exhibit, Defendants' A-1). It is to be noted that, rather than "incorporating" R.S. § 4283A, as claimed by Petitioner, Paragraph 13 of the *Loomis* text merely cites the statute in an attempt to avoid its operation wherever possible.

Petitioners also omit to set forth that notice of the accident and claim was given to the carrier's agents by letter of November 29, 1965 (2 weeks after the injury) (Trial Exhibit A-2); that a demand was made upon petitioners' San Francisco attorneys under date of July 1, 1966 (Tr. 71-73); and that petitioners' representatives never notified respondent, or her counsel, that it was claimed an action would be barred, either against the carrier *in personam,* or against the vessel *in rem,* until after the institution of the present action *in rem* and *in personam,* in July, 1967.

Respondent also urged in the Court below, that the limitation of time for suit against the carrier *in personam* was not enforceable in the circumstances of this case, because Paragraph 13 was not effectively incorporated into the contract of carriage, and the purported limitation was neither "distinctly declared" nor "deliberately accepted" within the meaning of *THE MAJESTIC*, 166 U.S. 375, 17 S.Ct. 597 (1897). Reversing upon the other ground, the Court of Appeals did not reach this latter contention. If certiorari is granted, and the holding of the Court below is reversed, the case should be remanded for further consideration of this issue.

REASONS FOR DENYING THE WRIT

There Is No Conflict In Decisions of the Court of Appeal

The decision of the Court below is not in conflict with the decision of the Court of Appeals for the Second Circuit in *Silvestri v. Italia Societa, etc.*, 388 F.2d 11 (2d Cir. 1968).

For all purposes relevant to this Petition Article 30[1] of the *Silvestri* ticket is the equivalent of Paragraph 13 of the *Loomis* ticket, i.e., the clause itself makes the time limitation provided therein applicable only to actions against "the Company" (Silvestri) or "the carrier" (Loomis).

In *Silvestri,* however, Article 32 of the ticket further provided as follows:

> "All the regulations, limitations and exceptions relating to the responsibility of the Company are understood to apply also to the responsibilities, if any, of its Agents, *its vessels,* its Masters and crew, its employees and, generally, all persons who act for the Company." (Emphasis supplied.)

Construing Article 30 with Article 32 of the *Silvestri* ticket, the Court of Appeals for the Second Circuit held that the limitation of time for suit against the Company, was extended by the contract to apply also to suit against the vessel *in rem.*

Petitioners urged the *Silvestri* decision upon the Court of Appeals for the Ninth Circuit in the case. The Court below held the *Silvestri* ticket distinguishable on two grounds:

1. The *Loomis* ticket contains no provision comparable to Article 32 of the *Silvestri* ticket.

2. Unlike the *Silvestri* ticket, the *Loomis* ticket

---

1. Both provisions of the *Silvestri* ticket are set forth in the opinion of the Court of Appeals for the Second Circuit, 388 F.2d 11, (at p. 12 and p. 13 respectively).

contained other provisions (See Paragraph 24 of Ex. 1) evidencing an intent to extend other specific immunities or limitations (but not the time for suit provision) to the vessel as well as the Carrier. In this respect the Court of Appeals for the Ninth Circuit found *The MONROSA v. Carbon Black Export, Inc.*, 254 F.2d 297 (5th Cir. 1958) 359 U.S. 180, 79 S. Ct. 710 (1959) (discussed later in this Brief) the controlling authority.

There is no conflict between the decision of the Court of Appeals for the Ninth Circuit in this case, and that of the Court of Appeals for the Second Circuit in the *Silvestri* case. The Court below considered that *Silvestri* decision and found it distinguishable on the grounds specified above.

The Decision of the Court of Appeals Is Not Inconsistent with Prior Decisions of This Court

The inconsistency claimed by Petitioner is between the decision below, which involved construction of a contract, and decisions of this Court which construed a statute.

The only issue presented by this Petition is whether this Court should review the decision of the Court below, construing the provisions of a contract, i.e., a steamship passenger ticket.

No issue is presented as to the construction of a statute.

R.S. § 4283A (Title 46 U.S.C. § 183b) provides in pertinent part as follows:

> "Stipulations limiting time for filing claims and commencing suit.
>
> (a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise

or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the date when the death or injury occurred.

(b) Failure to give such notice, where lawfully prescribed in such contract, shall not bar any such claim—

(1) If the owner or master of the vessel or his agent had knowledge of the injury, damage, or loss and the court determines that the owner has not been prejudiced by the failure to give such notice; nor

(2) If the court excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor

(3) Unless objection to such failure is raised by the owner."

Clearly, the office of the statute is to invalidate unreasonable contractual stipulations limiting the time for filing of claims or the commencement of suit.

As the Court of Appeals notes in its opinion, the respondents did not contend below that R.S. § 4283A was a statute of limitations binding on a passenger in the absence of an appropriate contractual provision. (447 F2d. 105 at 107).

The Court below pointed out that Paragraph 13 of the Loomis ticket "does not expressly apply to proceedings *in rem* against the vessel," (447 F2d. at 107). The Court went on to state:

> ". . . [i]t is a form contract, not a statute, that we construe here." 447 F2d at 108.

We submit there is no dispute as to the interpretation of the statute. Construed broadly, it permits

a carrier to provide by contract for extension of limitations and immunities, such as the limitation of time for suit, to the vessel, as well as the carrier itself.

Here, the carrier failed to do so.

In construing the Loomis ticket as not precluding actions *in rem* against the vessel commenced more than one year after the injury, the Court of Appeals for the Ninth Circuit reached a result fully consistent with the decision of the Court of Appeals for the Second Circuit in *Silvestri* (involving a contract different in two material respects).

Moreover, the Court of Appeals reached the only decisions consistent with the holding of this Court in *The MONROSA v. Carbon Black Export, Inc.*, 359 U.S. 185, 79 S.Ct. 710 (1959). In that case, the shipper of cargo brought suit in District Court in Texas to recover for cargo damage against the vessel *in rem* and against the carrier *in personam*. Relying on a provision of the bill or lading providing that ". . . no legal proceedings may be brought against the Captain or ship owners or their agents . . . except in Genoa . . ." the District granted a motion to decline jurisdiction.

The shipper appealed, and the Court of Appeals for the Fifth Circuit reversed holding that the quoted language did not preclude actions against the vessel *in rem* in jurisdictions other than Genoa. This Court granted certiorari. Its opinion states in part as follows (359 U.S. 180 at 182-3, 79 S. Ct. 710 at 712-3):

> "We find ourselves in agreement with the views of the Court of Appeals below that this clause should not be read as limiting the maintenance of an action *in rem*, cf. *The Maggie Hammond*, 9 Wall. 435, 449-450. 19 L. Ed. 772, against the vessel to enforce a maritime lien for

proper carriage. The initial words are particularly appropriate to a restriction of the clause to *in personam* actions, and the rest of the language is intelligible on this premise. In accordance with the familiar rule in such circumstances, we will not stretch the language when the party drafting such a form contract has not included a provision it easily might have . . .

"Accordingly, after oral argument, we have concluded that the Court of Appeals was correct in holding that the libel *in rem* was properly maintainable."

In so holding, this Court cited its own opinion in *The MAJESTIC*, 166 U.S. 375, 17 S.Ct. 597 (1897), construing a passenger ticket, in which the Court stated (166 U.S. at 386):

"We quite agree . . . that 'when a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted'."

The construction of the Loomis ticket (App. 1 to this Brief) is the only construction permissable under the decisions of this Court in *The MAJESTIC*, and *The MONROSA v. Carbon Black Export, Inc.*, *supra*.

Respectfully submitted,
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1-A

PRINCIPALS:
HAMBURG - SUEDAMERIKANISCHE DAMPFSCHIFFFAHRTS - GESELLSCHAFT EGGERT & AMSINCK

Columbus Line, Inc.

1st Copy for Carrier

Nº 3202

APPENDIX 1

CONTRACT TICKET
(not transferable)

Vessel MS SANTA ROSA Voy. No. 18 SB

Expected Time of Departure October 19th 1965

From Los Angeles (San Pedro, Outer Harbor) To Sydney

Agent at Port of Embarkation Bakke Steamship Corporation, 520 W Seventh Street Los Angeles Phone: MAdison 7-9621

Agent at Port of Destination Amtraco Travel Centre, 17/19 Bridge Street - Sydney

Names of Passengers	Sex	Age	Cabin	Berth	Ocean Fare	Taxes
1 MRS. EDITH B. LOOMIS	F	66	B	A	$ 600.00	
2 less 10% r/t reduction in conjunction with					$ 60.00	
3 Columbus Line open ticket No. 5021 Brisbane/Los Angeles					$	
4					$	
Funds paid in for drinks, etc. on board ship $				Total	$ 540.00	

Total amount received $

For the carrier

BAKKE STEAMSHIP CORPORATION (Stamp)
As Agents Only
Signature and Stamp

San Francisco, California
Issued at

September 27, 1965
Date

Passengers

Signature

Signature

Signature

Signature

TERMS AND CONDITIONS

1. It is agreed between the Carrier and passengers that whether or not this contract has been signed by or on behalf of them or any of them, the transportation provided for under this contract and the relations between Carrier, vessel and passengers shall be governed by and are subject to all terms stated herein. The person signing this contract covenants and warrants that he is duly authorized by or on behalf of all the passengers mentioned in this contract to agree to all the terms hereof and the passengers using this ticket agree that the signatures contained herein shall have the same force and effect as though each and everyone of them also signed this contract. On this understanding should the Carrier confirm the signature, number of all persons other than the undersigned, in duly executed printed vessels shall include singular and vice versa, and each female and vice versa.

(Continued Overpage)

354 Sam 8-63 JMcO Co.

(Continued on page 3)

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